Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Docket No. 78-1270

LARRY WAYNE McDANIEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

COMES NOW the Petitioner, LARRY WAYNE McDANIEL, by and through his attorneys, TIMOTHY N. SKIDMORE, Of Counsel, Harper, Skidmore & Botts, and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 12, 1978, affirming Petitioner's conviction of violating Title 18, Section 922(h), United States Code.

OPINION BELOW

The Opinion of The Court of Appeals for the Fifth Circuit was entered on June 12, 1978, is reported in 574 F.2d 1224 (1978), and is reprinted in Appendix I to this Petition.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 12, 1978 and a copy of same is appended to this petition at Appendix I, p. 22. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the Fourth Amendment apply to a seizure by a Federal agent who directed an airline employee to hand over a closed briefcase suspected to contain evidence of a crime and further directed him to open the sealed briefcase, where the government agent had time to obtain a search warrant and the airline employee requested a warrant but handed over the briefcase after the government agent told him such a warrant was not needed in this case?

2. Was the admission by the government of an "Outlaws" t-shirt containing a detachable object permissible over objection, where the shirt placed indirectly the evil character of the accused in issue, when the defendant did not first place his character in issue, and where the detachable object sought to be introduced by the government could have been introduced without the character evidence of the shirt and writing thereon, and where the shirt was irrelevant to the crime charged?

FEDERAL STATUTES INVOLVED

The pertinent portions of Title 18 of the United States Code § 922(h)(l), and Fed. Rules Evid. Rules 402, 403, and 404, 28 U.S.C.A., are set forth in the Appendix at pp. 26-27.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition Below.

This case involves a one (1) Count indictment charging Appellant with a violation of Title 18 United States Code, Section 922(h), specifically, receiving a Browning semi-automatic firearm in October, 1976 in the Northern District of Georgia, which had earlier been shipped in interstate commerce, and when the Appellant had earlier been convicted of the offense of Burglary, a felony.

The Appellant waived arraignment and pled not guilty on July 27, 1977. On August 15, 1977, a Motion to Suppress Evidence was filed, which came on for a hearing on August 16-17, 1977. On August 23, 1977, the trial judge adopted the Magistrate's Report and Recommendation denying the Motion to Suppress Evidence, over objection of Appellant. Appellant was tried before a jury on August 23-24, 1977, found guilty, and on September 19, 1977 was sentenced to serve a sentence of three (3) years under 18 U.S.C. § 4205(b)(2).

Appellant posted his appeal bond on September 20, 1977, and filed his Notice of Appeal on September 28, 1977. On December 8, 1977, the record was filed with the Court of Appeals for the Fifth Circuit.

On June 12, 1978, this case was heard before the Court of Appeals, Fifth Circuit. The appellate court affirmed the decision of the trial court and its decision is reported in **United States v. McDaniel,** 574 F.2d 1224.

II. Statement of Facts Relevant to the Issues Presented for Review

With respect to the denial of Appellant's Motion to Suppress evidence, the Appellant filed his Motion to Suppress Evidence and Brief on August 15, 1977, contending that the search and seizure of the Appellant's briefcase on or about February 3, 1977 by an ATF agent without a warrant was illegal, where no exigent circumstance existed so as to excuse the necessity of first obtaining a search warrant and where the evidence was not in plain view. (Record, p. 17)

At the hearing on this Motion, the evidence showed that on or about January 19, 1977, the Appellant checked his briefcase as baggage on a Delta flight and flew from Atlanta, Georgia non-stop to Tampa, Florida. (Transcript of Hearing on Motion to Suppress Evidence, hereinafter referred to as "M/S Transcript," p. 79) When he arrived in Tampa, Appellant attempted to claim his briefcase at the baggage claim area, and unable to locate it, made inquiry as to the whereabouts of his briefcase, and was advised it may have been put on a later flight (M/S Transcript, p. 80). Not locating his baggage after the next flight, the Appellant filled out a luggage claim report, advised the airline of his Tampa number and address, and checked with Delta Airlines a number of times about the briefcase, but was unable to obtain it (M/S Transcript, pp. 80-83).

The evidence adduced at the hearing showed that the briefcase was apparently misrouted and instead arrived in Manhattan, Kansas via Delta Airlines and Frontier Airlines (Record, p. 41). Because the baggage was unclaimed by the true owner when it arrived in Manhattan, Kansas, and failing to locate any external identification, the briefcase was secured in the baggage hold area of Frontier Airlines overnight and subsequently placed in the Manager's Office for a few days until it was opened for inspection by a supervisor of Frontier. (M/S Transcript, pp. 11-16).

On January 23, 1977, an authorized supervisor of Frontier Airlines retrieved the briefcase, opened it in an effort to discover the identity of the owner and discovered two firearms, various papers, clothing and other items (M/S Transcript, pp. 17-18). Attempts to contact various people to locate the owner proved fruitless, and upon asking for instructions from the security office, the supervisor was instructed to contact local law enforcement—Riley County Police Department—and advise them of the contents of the briefcase (M/S Transcript, pp. 19-20). Officers of Riley County did proceed to Frontier Airlines, but because they did not have a warrant, they obtained only the supervisor's statement, assisted him in sealing the briefcase shut with initialled tape and left without gaining access to the contents (M/S Transcript, p. 20).

Some days later, on February 3, 1977, a Special Agent of the Bureau of Alcohol, Tobacco and Firearms appeared and attempted to take possession of the briefcase and its contents, but was told by the supervisor at Frontier that he wanted a search warrant. (M/S Transcript, p. 29). The ATF Agent told him that a search warrant was not needed because there was contraband inside and instructed the supervisor to call his supervisor at Frontier and tell him an ATF agent was there (M/S Transcript, pp. 21, 29). The supervisor did make his call and after advising his supervisor that the ATF agent stated he did not need a search warrant, his supervisor authorized him to let the ATF agent have the briefcase (M/S Transcript, pp. 29, 36). Thereafter, at the instructions of the ATF agent, he broke the seal, opened the briefcase and gave the briefcase and its contents to the agent (M/S Transcript, pp. 35-36, 21).

The ATF agent, Robert Manske, had been requested by the Tampa ATF to try to pick up the briefcase because local authorities were requesting it in connection with an investigation in Pasco County, Florida, and was told of the Appellant's being a suspect in the investigation of the suitcase by the Tampa ATF Agent (M/S Transcript, pp. 48-51).

The Appellant took the stand only at the hearing for the purposes of establishing standing (M/S Transcript, p. 78). He testified that the briefcase was checked by him in Atlanta on a direct flight to Tampa (M/S Transcript, p. 79). He believed his luggage would not be searched (M/S Transcript, p. 83), that he thought the contents would not be subject to public viewing but would remain private, and that he did not authorize anyone to search the contents of the briefcase (M/S Transcript, p. 84). He identified several of the items and the briefcase as being his (M/S Transcript, pp. 85-86, 88-89).

The Magistrate's Report and Recommendation on the Motion to Suppress denied Appellant's Motion to Suppress and this ruling was adopted, over objection, by the trial judge (Trial Transcript, hereinafter referred to as "Transcript," p. 11). The Report and Recommendation ruled that there was no search in violation of the Fourth Amendment (Record, pp. 44, 50). Appellant objected to various parts of the Report and Recommendation, specifically disputing the finding that the search was not at the instructions of the ATF agent and therefore not subject to the Fourth Amendment (Transcript, pp. 6-11).

With respect to the admittance by the government of an "Outlaws" t-shirt during the government's presentation of its case-in-chief, the prosecutor had various witnesses identify various articles found in Appellant's briefcase which were unrelated to the firearm charge. Among those identified, over objection, was Government's Exhibit 8, a shirt found inside the Appellant's briefcase which had printed thereon the word "Outlaws", along with a pin attached to the shirt with the Mack truck emblem on it (Transcript, pp. 79, 86-89). The objections posed by defense counsel, as well as the motion for mistrial, protested the viewing of the shirt with the name "Outlaws" printed thereon as being irrelevant, calculated to prejudice the Appellant and inflame the jury and placed the Appellant's character in issue (Transcript, pp. 79, 86-88). Defense counsel proposed that a less prejudicial and acceptable method of introducing the pin attached to the shirt to show identity would be to simply remove the pin from the shirt and introduce the pin itself (Transcript, p. 89). The shirt was introduced into evidence, over objection (Transcript, pp. 123, 129). The shirt was viewed by the jury on several occasions by the government for the purpose of identifying the shirt as having come from the briefcase (Transcript, pp. 79, 91-91, 100, 114 and 123). On at least five occasions, therefore, the government persisted in showing the shirt found in the briefcase on February 3, 1977 in the trial of an offense of receiving a firearm in October, 1976.

The government did not seek to elaborate on the shirt and its purpose for introducing it other than to say it went to the issue of Appellant's identity with the briefcase. The only part of Government Exhibit 8, the shirt, was the attached pin bearing the Mack truck emblem and the word "Mack" subscribed on the pin, but a far less prejudicial alternative was proposed by defense counsel: to remove the detachable pin from the shirt and introduce the pin itself as having come from the briefcase. Therefore, the prejudicial effect of the irrelevant evidence of the name "Outlaws" printed on the shirt could have been avoided.

REASONS FOR GRANTING WRIT

I

The decision of the Fifth Circuit Court of Appeals in this case negates the requirement for a search warrant in a government seizure of evidence earlier searched by an airline employee acting in an individual capacity and who was directed by the government agent to give him the evidence in question, and is in conflict with its own prior decisions, other Circuit Court decisions, as well as United States Supreme Court cases, namely this Circuit's holding in *United States v. Pruett*, 551 F.2d 1365 (1977); *United States v. Blanton*, 479 F.2d 327 (1973); *Barnes v. United States*, 373 F.2d 517 (1967); and *Rent v. United States*, 209 F.2d 893 (1954); the Court of Appeals for the Eighth Circuit in *United States v. Kelly*, 529 F.2d 1365 (1976); the Court of Appeals for the Ninth Circuit in the case of *Corngold v. United States*, 367 F.2d 1 (1966) and *United States v. Sherwin*, 539 F.2d 1 (1976); the Court of Appeals for the Fourth Circuit in *United States v. Pryba*, 502 F.2d 391 (1974); and with the United States Supreme Court decisions in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970); *Cooper v. State of California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *Stoner v. State of California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); *Preston v. United States*, 376 U.S. 364, 84 S.Ct 881, 11 L.Ed.2d 777 (1964); *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed.2d 59 (1951); *Rabinowitz v. United States*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948); *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927); and *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1922).

The questions presented in this case on the issue concerning the seizure of evidence are dual: (1) Was the search or seizure subject to the Fourth Amendment governing government actions and (2) did it meet the Fourth Amendment's standard?

The fundamental inquiry of the United States Supreme Court in considering Fourth Amendment issues is whether or not the search or seizure is reasonable under the circumstances. *United States v. Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538, 547 (1977); *Cooper v. State of California*, 386 U.S. 58, 59, 87 S.Ct. 788, 790, 17 L.Ed.2d 730, 732 (1967); *Preston v. United States*, 376 U.S. 364, 366-67, 84 S.Ct. 881, 882-83, 11 L.Ed.2d 777, 779 (1964).

The United States Supreme Court has ruled that the Fourth Amendment forbidding unreasonable searches or seizures applied only to government action, and not action of private individuals where there was no government involvement. *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 2048-49, 29 L.Ed.2d 564, 595 (1971); *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048, 1051 (1922).

In defining a private search, the United States Supreme Court has stated that the Fourth Amendment applies only if the private parties, "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the State." *Coolidge v. New Hampshire*, 403 U.S. at 487, 91 S. Ct. at 2049, 29 L.Ed.2d at 595 (1971). In *Coolidge v. New Hampshire*, id., the Supreme Court held that the Fourth Amendment was not implicated when articles discovered in a private search were voluntarily turned over to government officials, since it was found that the suspect's wife acted wholly on her own initiative and such individual conduct was devoid of governmental involvement.

The actions of a private person, however, may be attributed to the government so as to require application of the Fourth Amendment where police acquiesce in the unlawful or outrageous conduct of a private individual acting solely for a law enforcement purpose. *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976).

Where governmental involvement in a search is so pervasive that it is no longer even nominally private, the Fourth Amendment is applicable to such a "joint venture" because of the intrusive actions of the officials themselves. *United States v. Sherwin, supra.*

In *United States v. Sherwin,* the Ninth Circuit Court of Appeals held that a search made of broken cartons containing allegedly obscene books by the manager of a trucking terminal that received a shipment of cartons was not a "search" within the Fourth Amendment where there was no official involvement until after the terminal manager had completed his search and called the FBI and, when the agents arrived, they did not conduct a more extensive search, but confined their activities to viewing the materials displayed to them by the manager; further, voluntary relinquishment that "seizure" and, accordingly, the agent did not act unlawfully when he failed to obtain a warrant before receiving the books. *United States v. Sherwin, supra.*

The evidence of this case clearly shows that the airline employee was acting as an instrument of the State when he was directed by the government agent of the Bureau of Alcohol, Tobacco and Firearms to hand over the briefcase, and was further directed by the federal agent to open the briefcase. The airline employee had stated to the government agent prior to responding to the agent's commands that the policy of Frontier Airlines in such a case is to require a search warrant from police officers. The federal agent nevertheless instructed the Frontier Airline employee to call the supervisor and when the

federal agent told the airline employee that he did not need a search warrant in this case because the briefcase contained contraband, the airline employee's supervisor authorized the employee to hand the briefcase over to the government agent. Such a seizure as demonstrated in this case at bar constitutes government conduct so unreasonable as to necessitate the operation of the Fourth Amendment exclusionary rule.

In this case, the Frontier Airline employee weeks earlier had found two loaded firearms and what he suspected to be narcotics. He resealed the briefcase with masking tape and reported his discovery to the local police. The local police came out, but did not gain access to the briefcase or its contents because they did not have a search warrant as required by Frontier Airlines. They instead passed the information to the Bureau of Alcohol, Tobacco and Firearms, which some weeks later sent an agent to the airport. The initial search by the airline employee, a private person, was clearly outside the protection of the Fourth Amendment. The government's subsequent action, however, in informing the airline employee that a search warrant was not needed because there was contraband inside the briefcase, was clearly an obtrusive involvement on behalf of the government agent. The federal agent told the employee that a search warrant was not needed and instructed the employee to call his supervisor at Frontier and tell him an ATF agent was there. The employee did make this call and after advising his supervisor that the ATF agent stated he did not need a search warrant, his supervisor authorized him to let the ATF agent have the briefcase. Thereafter, at the instructions of the ATF agent, he broke the seal, opened the briefcase and gave the briefcase and its contents to the agent.

Prior to the time of acquisition by the government agent of the evidence contained in the briefcase, the briefcase had been sealed with masking tape by the airline employee who then locked the briefcase in the most secure place in the airport.

The Fifth Circuit Court of Appeals in reaching the conclusion of the case at hand relied upon *United States v. Blanton*, 479 F.2d 327 (5th Cir. 1973). The *Blanton* case is to be distinguished from the present case due to several factors. In *Blanton*, there was a bag that was left in an unsupervised public baggage area. An airline attendant opened an attache case found inside the bag and discovered what appeared to him to be a silencer as well as a pistol. The attendant called an airport security guard who called local police officers to report the event, and they, in turn, upon being told that one of the items found in the bag could be a silencer, directed the guard to call federal officers in New Orleans. When the federal agents arrived in the *Blanton* case the bag was freely and voluntarily turned over to the federal agent without any instruction by the government officer. The federal agent opened the bag, observed the silencer, and arrested Blanton.

The *Blanton* decision was based on an earlier case in the Fifth Circuit, namely *Barnes v. United States*, 373 F.2d 517 (5th Cir. 1967). In *Barnes*, the motel owner opened the bag and found blank checks with identical numbers made out to Barnes, numerous blank checks and a rubber stamp for affixing Barnes' name to checks. He became suspicious, called the police, informed them of the bag's contents and freely made the bag available to the authorities. The search complained of in *Barnes* clearly did not involve governmental action and was therefore not illegal within the meaning of the Fourth Amendment. *Barnes v. United States*, 373 F.2d at 518.

As stated in the *Blanton* case, "this implicit basis for this holding in *Barnes* is that the initial search was made by a private person and the events which later transpired did not constitute a separate or additional search which could be equated with a search prescribed by the two-part test of the Fourth Amendment: (1) an unreasonable search (2) by a state or federal officer. . . . The *Barnes* opinion states that the motel owner made 'it',

meaning the bag, available to the officers. That is precisely what happened in the instant case." *United States v. Blanton*, 479 F.2d at 328.

Barnes and *Blanton* "are to be distinguished from cases where the officers participated in or are in league with private persons in making the initial search." *United States v. Blanton*, 479 F.2d at 327.

It is not the initial search in the case at bar that distinguishes it from other cases of this sort, but rather the intrusive actions of the government agent in *seizing* the briefcase.

The holding of the Fifth Circuit Court of Appeals that the Trial Court found is a fact that there occurred a "voluntary transfer" of the briefcase is in conflict with the record and evidence in this case.

In considering a search by state officers with the help of a federal officer under color of authority, the Supreme Court found that the search in substance and effect was a joint operation of local and federal officers. When a federal agent participates in such a joint endeavor, the Supreme Court said, "The effect is the same as though he had engaged in the undertaking as one exclusively his own." *Byars v. United States*, 273 U.S. 28, 33, 47 S.Ct. 248, 250, 71 L.Ed. 520, 523 (1927).

As stated in the facts of this case, the local authorities from the Riley County Police Department did proceed to Frontier Airlines after being informed of the contents found in the briefcase. Because they did not have a warrant, they obtained only the airline supervisor's statement, assisted him in sealing the briefcase shut with initialed tape, and left without gaining access to the contents. It was days later when a Special Agent of the Bureau of Alcohol, Tobacco and Firearms proceeded to Frontier Airlines in order to obtain the contents of the briefcase.

In the case of *United States v. Kelly*, 529 F.2d 1365 (1976), the Court of Appeals for the Eighth Circuit held that a search by private individuals did not implicate the Fourth Amendment, but that the government's subsequent acquisition of books discovered in the private search constituted a "seizure" in violation of the Amendment. The materials in question in *United States v. Kelly, Id.*, were in control of UPS and there is no indication that Kelly intended to destroy the evidence. The police do not have to act immediately to preserve evidence of the crime. Even though UPS consented to FBI's warrantless seizure, it was illegal.

Warrantless searches or seizures are per se unreasonable unless there are special circumstances which excuse compliance to the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971).

A search by United States Customs officials together with the directed "help" of an airline employee constituted a search by federal agents and a warrantless search was not justified even though there was probable cause because (1) there was no warrant, (2) there was no arrest and (3) there was nothing to prevent the agent from obtaining a warrant upon the proper showing. *Corngold v. United States*, 367 F.2d 1, 3 (9th Cir. 1966).

Opportunity to obtain a warrant is one of the factors to be weighed in determining reasonableness. *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948); *Rabinowitz v. United States*, 339 U.S. 56, 70 S.Ct. 430, 94 L. Ed. 653 (1950); *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

The Fourth Amendment, which prohibits unreasonable searches and seizures, requires adherence to judicial processes. Only where incident to a valid arrest or in exceptional circumstances may an exception lie, and then the burden is on those

seeking the exemption to show the need for it. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L. Ed. 564, 576 (1971); *Stoner v. State of California*, 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed.2d 856, 859 (1964); *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59, 64 (1951). Clearly in this case there was no contemporaneous arrest or exceptional circumstances.

Although not a controlling factor, the absence of a showing that the officers did not have time to obtain warrants is relevant. *Rent v. United States*, 209 F.2d 893, 899 (5th Cir. 1954). In the instant case, there clearly was ample time for the federal agents to obtain a search warrant. The agent had knowledge of the contents of the briefcase, and could have easily obtained a warrant.

When a search is made at the behest of or with the assistance of law enforcement officers, there must be probable cause, and in appropriate instances an authorizing warrant, if the search is to pass constitutional muster. *United States v. Pryba*, 502 F.2d 391, 398 (4th Cir. 1974).

Even though probable cause may exist, absent exigent circumstances a federal agent must obtain a warrant for evidence to be seized. In *United States v. Pruett*, 551 F.2d 1365, the Fifth Circuit Court of Appeals held that since the government agent had absolute knowledge of the evidence to be seized, it was necessary to have that knowledge confirmed by an impartial magistrate before effecting seizure under nonexigent circumstances. A warrant for seizure could readily have been, but was not, obtained. *United States v. Pruett*, 551 F.2d 1365, 1370 (5th Cir. 1977).

The rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority." *Stoner v. State of*

California, 376 U.S. 483, 488, 84 S.Ct. 889, 892, 11 L.Ed.2d 856, 860 (1964).

Searches for evidence of crimes present situations demanding the greatest, not the least, restraint upon the government's intrusions into privacy, and although the Fourth Amendment's protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed. *Abel v. United States*, 362 U.S. 217, 237, 80 S.Ct. 683, 696, 4 L.Ed.2d 668, 685 (1960).

II

The second issue presented for review in this case concerns the question of whether the admission by the government of an "Outlaws" T-shirt containing a detachable object was permissible over objection, where the shirt placed indirectly the evil character of the accused in issue, when the Defendant did not first place his character in issue, and where the detachable object sought to be introduced by the government could have been introduced without the character reference of the shirt and writing thereon, and where the shirt was irrelevant to the crime charged.

Evidence of evil character of the accused is inadmissible on behalf of the prosecution to establish a probability of his guilt. Common law tradition almost unanimously has come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. It is said to weigh too much with a jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218, 93 L.Ed. 168, 173-74 (1948).

The purpose of admitting the name pin found on the shirt was to identify the Defendant. The "Outlaws" T-shirt was not

relevant to establish identity, but rather served to identify the Defendant as an "Outlaw." The admittance by the judge in the McDaniel case of the "Outlaws" T-shirt for the purpose of identification was erroneous because of its prejudicial effect on the jurors due to the evil connotation affixed to Outlaws in our society. This is especially true where it was suggested by Defendant's counsel that for the purposes of identifying the accused, the identifying name pin attached to the shirt be removed from the prejudicial Outlaws T-shirt and introduced absent the shirt. (T. p. 89).

The probative value of the name pin found on the T-shirt in the briefcase identifying the accused is recognized by the Petitioner; however, the prejudicial method in which it was submitted attached to the T-shirt failed to meet the requirements of the Federal Rules of Evidence 403 and 404.

Probative value must outweigh the probability of prejudice before even relevant evidence can be admitted. *United States v. Marcey*, 440 F.2d 281, 284 (D.C. Cir. 1971). The word "Outlaws" on the shirt was a concerted attempt on the part of the prosecutor and government agents who testified to associate the appellant with the inflaming wrongs often attributed to Outlaws, and should have been excluded.

The character of the defendant in a criminal case is not an issue in the case unless the defendant chooses to make it one. *Greer v. United States*, 245 U.S. 559, 560, 38 S.Ct. 209, 210, 62 L.Ed. 469, 471 (1918). In the present case, the Petitioner chose not to make his character an issue and took the stand only at the hearing on the Motion to Suppress Evidence for the purposes of establishing standing.

Unless and until the accused puts his character in issue by giving evidence of his good character by taking the stand and raising an issue as to his credibility, the prosecutor is forbidden to introduce evidence of the bad character of an accused simply

to prove that he is a bad man likely to engage in criminal conduct. *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973).

The government did not seek to elaborate on the shirt and its purpose for introducing it other than to say it went to the issue of appellant's identity with the briefcase. The prejudicial effect of the irrelevant evidence of the name "Outlaws" printed on the shirt could have been avoided by removing the detachable pin from the shirt and introducing the pin itself as having come from the briefcase. The Fifth Circuit Court of Appeals held in *United States v. Roland*, 449 F.2d 1281, 1282 (1971), that the prosecution may not offer evidence concerning the defendant's character or reputation during its case-in-chief. It is the position of the Petitioner in this case that the basic principle that a prosecutor is forbidden to introduce evidence of bad character of the accused simply to prove that he is a bad man likely to engage in criminal conduct cannot be circumvented by allowing the prosecutor to admit into evidence a T-shirt whose effect on the jurors is to inflame and prejudice.

CONCLUSION

The facts clearly establish that the intrusive actions on the part of the government agent in seizing the briefcase without a search warrant were in violation of the Petitioner's Constitutional rights and therefore, the illegally seized evidence should have been suppressed. Furthermore, it is contended by the Petitioner that there was error in the admission by the government over objection of an "Outlaws" T-shirt, in that it indirectly placed an evil character of the accused in issue when the defendant did not first place his character in issue, and where the detachable object sought to be introduced by the Government could have been introduced without the character evidence of the shirt and writing thereon, and where the shirt was irrelevant to the crime charged.

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I, TIMOTHY N. SKIDMORE, attorney for LARRY WAYNE McDANIEL, petitioner herein, hereby certify that on the 17th day of January, 1979, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the parties hereto as follows:

On the United States, by mailing a copy thereof to the Office of William L. Harper, Esq., United States Attorney for the Northern District of Georgia, Attn: Dorothy Y. Kirkley, Assistant United States Attorney, by mailing a copy in a duly addressed envelope with sufficient postage thereon to the United States Courthouse, 56 Forsyth Street, N.W., Room 428, Atlanta, Georgia 30303; and by mailing a copy in a duly addressed envelope with air mail postage prepaid to Wade H. McCree, Jr., Solicitor General, Dept. of Justice, Room 5143, Washington, D.C. 20053.

TIMOTHY N. SKIDMORE

APPENDIX

APPENDIX I

Opinion of the United States Court of Appeals

UNITED STATES of America,
Plaintiff-Appellee,

v.

Larry Wayne McDANIEL,
Defendant-Appellant.

No. 77-5675

Summary Calendar.

United States Court of Appeals
Fifth Circuit

June 12, 1978

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, GEE and FAY, Circuit Judges.

RONEY, Circuit Judge:

Defendant Larry Wayne McDaniel was found guilty of violating 18 U.S.C.A. § 922(h), which makes it unlawful for a convicted felon to receive a firearm which has been shipped in interstate commerce. The gun was found when an airline employee opened defendant's attaché case in an effort to discover to whom it belonged, the unmarked case having been sent as checked luggage and misrouted. Defendant complains of the Government's subsequent warrantless "seizure" of the briefcase and its contents from the airline. The initial search

by the airline employee, a private person, was clearly outside the protection of the Fourth Amendment. Since the airline then voluntarily notified the authorities and turned the briefcase over to them, the Government's action did not constitute a separate search or seizure. Accordingly, the district court was correct in denying the motion to suppress.

Defendant also contends that the court erred in allowing into evidence a shirt with the word "Outlaws" on it and a second firearm found in the briefcase, objected to by defendant as irrelevant and prejudicial. The trial court did not abuse its discretion in admitting these two items.

A review of the trial transcript revealing sufficient evidence to support the conviction, we affirm.

The "Search"

In January 1977, defendant checked his briefcase on a Delta flight from Atlanta, Georgia to Tampa, Florida. The briefcase was misrouted and arrived in Manhattan, Kansas with Frontier Airlines. Because the briefcase was not claimed and had no external identification, it was held by Frontier. On January 23, a Frontier supervisor opened the briefcase in an effort to discover the identity of its owner. Instead, he discovered two loaded firearms and what he suspected to be narcotics. He resealed the briefcase and reported his discovery to the local police. They passed the information to the Bureau of Alcohol, Tobacco & Firearms, which sent an agent to the airport. The Frontier supervisor turned the briefcase over to the agent. He and the Frontier supervisor then reopened the briefcase and inventoried its contents.

Defendant maintains that the Government agent should have gotten a warrant before seizing the briefcase and searching its

contents. He contends the district court erred in finding that Frontier voluntarily turned the briefcase over to the agent.

[1,2] To violate the Fourth Amendment, a search must be "(1) an unreasonable search (2) by a state or federal officer." *United States v. Blanton*, 479 F.2d 327, 328 (5th Cir. 1973). That Amendment proscribes only governmental action. A search by a private individual for purely private reasons does not fall within Fourth Amendment proscriptions. *See, e. g., Burdeau v. McDowell*, 256 U.S. 465, 475-476, 471 S. Ct. 574, 65 L.Ed. 1048 (1921); *United States v. Lamar*, 545 F.2d 488, 490 (5th Cir.), *cert. denied*, 430 U.S. 959, 97 S.Ct. 1609, 51 L.Ed.2d 810 (1977); *United States v. Crabtree*, 545 F.2d 884, 886 (4th Cir. 1976); *United States v. Sherwin*, 539 F.2d 1, 5-6 (9th Cir. 1976) (*en banc*); *United States v. Capra*, 501 F.2d 267, 272-273 n.4 (2d Cir. 1974), *cert. denied*, 420 U.S. 990, 95 S.Ct. 1424, 43 L.Ed.2d 670 (1975); *United States v. Blanton*, 479 F.2d 327, 328 (5th Cir. 1973).

Defendant concedes the initial search by Frontier did not violate the Fourth Amendment. He contends, however, that the Government was required to obtain a warrant before it "seized" the briefcase from Frontier. The law in this Circuit is to the contrary. The Government's actions "did not constitute a separate or additional search which could be equated with a search proscribed by the . . . Fourth Amendment." *United States v. Blanton*, 479 F.2d 327, 328 (5th Cir. 1973).

In *Blanton*, defendant was convicted of possessing and transporting a silencer for a firearm. An airline employee found defendant's suitcase in the airport's baggage claim area. Since it was unclaimed and had no external means of identification, the employee opened the bag to determine its ownership. He found a pistol and a silencer inside. He reclosed the bag and called federal officers, who reopened the bag when they arrived. On appeal, Blanton made the same argument defendant McDaniel

now raises: that "the federal officer made a new search under circumstances where a warrant could have been obtained." 479 F.2d at 328. The Court rejected that argument. It found it of no significance that the federal officers reopened the bag, as opposed to seeing the evidence in plain view had the bag been left open by the airline employee. The initial search was valid because it was by a private person, who then turned the evidence over to the authorities. The Court held that the Government's actions in that situation did not constitute a "separate or additional search."

[3] Defendant contends that unlike the situation in *Blanton*, the airline employee here did not *voluntarily* give the briefcase to the Government agent. The district court concluded, however, that the airline did voluntarily turn the briefcase over to the Government, a finding of fact supported by the evidence. The Frontier airline employee testified at the suppression hearing that he had been instructed by his supervisor, the airline's director of security, to request a warrant from the local police if they took the bag. When the Government agent arrived, the Frontier employee asked him if he had a warrant, and the agent said he did not need one because there was contraband in the briefcase. The Frontier employee then checked with the airline's director of security, who instructed him to release the briefcase. This testimony by the Frontier employee was corroborated by the testimony of the Government agent.

[4] Since the airline voluntarily released the briefcase to the Government, this case is controlled by our decision in *Blanton*. The district court correctly denied the motion to suppress.

The Second Gun and the "Outlaws" Shirt

Defendant contends on grounds of irrelevancy and unfair prejudice, that the district court erred in admitting into evidence a second gun and a shirt with the word "Outlaws" on it, both found in the briefcase.

[5, 6] The gun was admitted only to establish the contents of the case. A witness had testified that defendant told him the briefcase contained two guns, and the gun was introduced to corroborate the witness' testimony. Evidence of other crimes, closely related in both time and nature to the crime charged, may be admitted to establish the *res gestae*, that is, "the common scheme or history of the crime, of which the other crimes constitute a part." *United States v. Blewitt*, 538 F.2d 1099, 1100 (5th Cir.), *cert. denied*, 429 U.S. 1026, 97 S.Ct. 650, 50 L.Ed.2d 629 (1976). The admission of the gun was necessary to complete the story told at trial. No error occurred.

[7] The shirt with the word "Outlaws" on it was introduced by the Government for the purpose of identifying the briefcase in which it was found as belonging to defendant. The shirt had a pin with the word and emblem "Mack" on it. Defendant was known as "Larry Mack," and had adopted the "Mack" emblem. Thus, the shirt was relevant to establish defendant's ownership of the briefcase.

[8] Rule 403, Fed.R.Evid., allows the trial judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." This balancing test is committed to the sound discretion of the trial judge. His decision on admissibility can be disturbed only upon a showing of abuse of discretion. *United States v. Brown*, 547 F.2d 1264, 1266 (5th Cir. 1977). The district court did not abuse its discretion in admitting the shirt into evidence.

Sufficiency of the Evidence

[9] Defendant attacks the sufficiency of the evidence against him. While the Government's case was proved principally by circumstantial evidence, that evidence was sufficient for the jury to find defendant guilty.

AFFIRMED.

APPENDIX II

Federal Statutes Involved

The following portions of Title 18 of the United States Code are pertinent to this case:

§922. Unlawful Acts

(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The following portions of Title 28 of the United States Code are pertinent to this case:

RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut same;

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Supreme Court, U.S.
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No. 78-1270

In the Supreme Court of the United States

OCTOBER TERM, 1978

LARRY WAYNE McDANIEL, PETITIONER

v.

United STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 574 F. 2d 1224.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1978. The petition for a writ of certiorari was filed on February 15, 1979, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record supports the finding that airline personnel who had conducted a private search of an unclaimed briefcase containing two firearms voluntarily turned the briefcase and its contents over to a federal agent.

2. Whether the trial court abused its discretion in admitting into evidence a shirt found in the same briefcase because the shirt had the word "Outlaws" printed on it.

STATEMENT

Following a jury trial held in the United States District Court for the Northern District of Georgia, petitioner, a previously convicted felon, was found guilty of receipt of a firearm that had moved in interstate commerce, in violation of 18 U.S.C. 922(h), and was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence adduced at the pretrial suppression hearing showed that on January 19, 1977, petitioner checked his briefcase when he took a Delta Airlines flight from Atlanta, Georgia to Tampa, Florida (S. Tr. 79). The briefcase was misrouted however, and arrived in Manhattan, Kansas, where it was received and held by Frontier Airlines when it was not claimed (S. Tr. 11-16). Because there was no external identification on the unclaimed briefcase, a Frontier supervisor opened the briefcase to discover the identity of its owner (S. Tr. 11-16). Inside the briefcase were two loaded firearms, what appeared to be narcotics, and some clothing, including a shirt with the word "Outlaws" printed on it (S. Tr. 17-18). The supervisor reported the discovery to the local police, who in turn notified the Bureau of Alcohol, Tobacco and Firearms, which sent an agent to the airport to recover the briefcase and its contents (S. Tr. 29). When the agent asked for the briefcase, an airline employee at first refused, saying a warrant was required (S. Tr. 21). On the agent's suggestion, the employee called a supervisor, who authorized him to turn the briefcase over without a warrant (S. Tr. 21, 29). The airline employee and the agent then reopened the briefcase, and inventoried its contents (S. Tr. 21-22, 35-36).

After an evidentiary hearing the magistrate recommended that petitioner's motion to suppress the contents of the briefcase be denied, and the district court followed his recommendation (Tr. 11-16). Both the firearms and the shirt with the word "Outlaws" printed on it were admitted into evidence at trial.

ARGUMENT

1. As petitioner apparently concedes, the court of appeals was correct in holding (Pet. App. A-3) that the Fourth Amendment applies only to government searches and seizures, not to a search by a private party who then voluntarily gives the evidence he has discovered to government agents. See, *e.g.*, *Burdeau* v. *McDowell*, 256 U.S. 465, 475-476 (1921); *United States* v. *Lamar*, 545 F. 2d 488, 490 (5th Cir.), cert. denied, 430 U.S. 959 (1977); *United States* v. *Crabtree*, 545 F. 2d 884, 885-886 (4th Cir. 1976); *United States* v. *Sherwin*, 539 F. 2d 1, 5-7 (9th Cir. 1976); *United States* v. *Capra*, 501 F. 2d 267, 272-273, n. 4 (2d Cir. 1974); *United States* v. *Blanton*, 479 F. 2d 327, 328 (5th Cir. 1973); *Barnes* v. *United States*, 373 F. 2d 517 (5th Cir. 1967).

Petitioner contends (Pet. 13), however, that the lower courts erred in concluding that the airline voluntarily turned over the briefcase and its contents. This contention is without merit. "Voluntariness is a question of fact to be determined from all the circumstances," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973), and the record amply supports the findings of both courts below that the airline voluntarily turned the briefcase over to the federal agents.

When the federal agent first sought to take possession of the briefcase, an airline employee stated that he had been instructed not to give it up without a warrant. But when the agent replied that he did not believe that a warrant was required, the employee checked with the airline security director, who told him to give the agent the briefcase (S. Tr. 21, 29). The airline employee denied that the agent had "command[ed]" him to turn over the briefcase, and he testified the security director told him, " 'If the ATF wants the bag, give them the bag' " (S. Tr. 21).

Petitioner emphasizes the employee's testimony that he related to the security director the agent's statement that he did not believe he needed a warrant (S. Tr. 21, 29). But this is not a case like *Bumper* v. *North Carolina*, 391 U.S. 543, 549 (1968) (footnote omitted), where the claimed consent was "no more than acquiescence to a claim of lawful authority." The record establishes that the airline employee understood the agent's statement as tentative, not commanding: "[H]e says, 'I don't believe I need one in this case * * *' " (S. Tr. 29). And although the employee did repeat the agent's statement to his supervisor when he called for further instructions, there was no showing that the supervisor ordered the employee to turn the briefcase over because he believed he was required to acquiesce. Indeed, if anything, the employee's testimony suggested that his supervisor had told him that the airline's policy of requesting a warrant applied only to local police. The employee stated that the only reason he asked the ATF agent for a warrant was because he had been instructed by the director of security to require a warrant if "the locals" wanted to take the briefcase, and the employee then added that he didn't "know one police department from another" (Tr. 36).

In view of all the testimony, the lower courts' findings that the airline made a private search of the briefcase and then voluntarily turned it over to the agent cannot be said to be clearly erroneous.[1]

2. Petitioner also contends (Pet. 16-18) that the district court improperly permitted the introduction of evidence of his bad character by admitting the t-shirt bearing the word "Outlaws."

This claim is also without merit. The shirt, which was found in the briefcase, was relevant evidence that petititioner was the owner of the briefcase. Petitioner's nickname was "Larry Mack," and a pin bearing the word and emblem "Mack" was found attached to the shirt (Pet. App. A-5). However, because petitioner argued that introduction of the shirt would be prejudicial, inflaming the jury's prejudices and branding him an "Outlaw," the trial court had the discretion under Fed. R. Evid. 403 to exclude the shirt "if its probative value [was] substantially outweighed by the danger of unfair prejudice * * *." The court of appeals correctly concluded (Pet. App. A-5) that the

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[1]The cases upon which petitioner relies are inapposite. In *United States* v. *Kelley*, 529 F. 2d 1365, 1372-1373 (8th Cir. 1976), the court held that the government's warrantless seizure of books and magazines discovered in a private search violated the Fourth Amendment because "the proper seizure of books and magazines, which are presumptively protected by the First Amendment, demands a greater adherence to the Fourth Amendment warrant requirement." The court stated that the books and magazines had been "seized" by a government agent (not voluntarily turned over by a private party), and the court expressly distinguished books and magazines from firearms, which the agent might have seized without a warrant. 529 F. 2d at 1372. In *Corngold* v. *United States*, 367 F. 2d 1, 4-5 (9th Cir. 1866), the court found that the search had been conducted at the behest and solely for the interests of the law enforcement officers, and accordingly it was not a "private" search. Finally, *United States* v. *Chadwick*, 433 U.S. 1 (1977), did not involve a private search in any way.

district court did not abuse its discretion by admitting the shirt. The record contains no support for petitioner's charge that the government intended to use the shirt to put petitioner's character at issue and to portray him as an "Outlaw." The government did not point out the word "Outlaws" on the shirt and never suggested that the word was probative of petitioner's character.[2] Since "[t]he duty of weighing the probative value of the [] evidence against its prejudicial effect rested squarely on the shoulders of the experienced trial judge," whose discretionary determination should not be reversed unless he acted "arbitrarily or irrationally," *United States* v. *Robinson*, 560 F. 2d 507, 514-515 (2d Cir. 1977) (*en banc*), cert. denied, 435 U.S. 905 (1978), the court of appeals correctly rejected petitioner's claim of error. See *United States* v. *Long*, 574 F. 2d 761, 767 (3d Cir.), cert. denied, No. 78-626, (Nov. 27, 1978); *United States* v. *Cowsen*, 530 F. 2d 734, 738 (7th Cir.), cert. denied, 426 U.S. 909 (1976).

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[2]Indeed, although the shirt was identified by the government's witnesses and introduced into evidence (Tr. 79, 86-89, 123, 129), it is not entirely clear that the jury ever saw the word printed on it. At the time of petitioner's first objection, when the shirt was identified by the government witness, the district court stated that neither he nor the jury could read the word on the shirt when the witness handled it (Tr. 87-88), and we have found no indication in the record that the shirt was later displayed in a different fashion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

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